(1)

Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

RONALD JARMUTH
AND
ANGELA FRINZI

Petitioners

v.

BRIAN KROLCZYK,
VALLEY COMPREHENSIVE COMMUNITY MENTAL HEALTH CENTER, INC,
MONONGALIA COUNTY, WV BOARD OF EDUCATION,
AND
HARRISON COUNTY, WV, BOARD OF EDUCATION

On Petition For Writ Of Certiorari
To The Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

Introductory Statement

In a case referred by a state circuit judge to a family law master who was asked to modify a parenting plan. That matter involved two long divorced parents of a child where the primary custodian (Angela Frinzi) relocated to a nearby county within the same state (WV). The master ordered (Appdx. 14, all orders identical except for adult's name) the parents and their significant others, but not the child to submit to a clinical (psychological) evaluation from a specified mental health facility. He entered the orders without notice or hearing. The master lacked the authority (WVC 48A-4-9 -13, -15, -20 Appdx 31-32) to enter any non-procedural, non-consensual order. The statute cited in the orders, WVC 48-11-301 (Appdx. 30) which required an order signed by a state Circuit Judge), provided authority only for an evaluation of the child -- to identify the special needs, if any, of the child so as to reflect them in a parenting plan and to prepare a report concerning only the child. The "compulsory" adult patients were required to pay for the evaluations themselves and did so. Prior to submitting to any services the adults asserted that they were not undergoing evaluations because of the (defective) order but as clients with all related rights. The mental health facility required them to sign statements (Appdx. 58) of client rights - required by 45 CFR 164 (Appdx 23, Privacy of Records) which were co-signed by a representative of the facility guaranteeing the "privacy of records" and the "exercise of civil rights". An administrative employee of the mental health facility with no professional responsibilities pretended to be a psychologist and conducted the clinical evaluations of the adults. In the course of this session he asked and obtained information about very private details of the patients' lives. Those details would never have been disclosed if the patients had any hint that the evaluator was

neither licensed nor even supervised. The mental health facility provided at least one petitioner a letter (Appdx. p 34) stating that the employee who performed the clinical evaluations was a psychologist.

The master's orders (Appdx. 14) for evaluation did not require that the facility provide a report of the clinical evaluations to the court. The orders required that, per the statute, the facility conduct an investigation of the child's needs and that was to be the subject of the report. The orders directed that the facility provide the court and others copies of a report.

The mental health facility did not make any attempt to verify the master's authority to enter the order or his authority to order clinical evaluations of persons other than the child.

Without prior or later notice to the clients and ignoring the signed agreement of client rights, the administrative employee disclosed (Appdx. 35, all "reports" similar) all the contents of the mental health files to the Court and to specified non-court persons. The administrative employee did so by providing his clinical evaluations of the adults instead of furnishing a report of an investigator as to the child. He also discussed his clinical evaluations of the adults with the Guardian Ad Litem for the child - who herself had no release and no authority under law to obtain such disclosures regarding the adults unlawfully examined.

The administrative employee was never identified pre-trial as an expert witness (and thus never questioned by counsel for parties). Lacking the actual qualifications by training or experience to address child custody, the administrative employee was presented the day of trial as an expert witness by the Guardian Ad Litem. He lied under oath about both his licensure status (Appdx. 41, 42) and his experience (Appdx. 46, 42), in order to take the stand. The mental health records of the mental health facility "clients" were protected by federal and state statute and rule. At the hearing on the parenting plan the master never ordered the

administrative employee to breach the records privacy of the adults. The employee did so on his own (Appdx. 43-45). In testifying, the employee proceeded without the release required by federal and state statutes and rules, breaching the privacy of the records. It was foreseeable that sooner or later the patients would learn that they had revealed intimate information to an imposter and that this would cause mental anguish and suffering to the victims.

The administrative employee was later convicted (Appdx. 17) by the state ethics board (sitting as an administrative law tribunal) of practicing psychology without a license and violating mental health privacy statutes. The charges to which he plead guilty including his disclosures before and at trial and his taking the stand to offer a professional psychological opinion. No immunity of the employee for what he did putatively pursuant to the master's order was recognized by the Administrative Law Tribunal.

Petitioners claimed in their suit, among other things, invasion of privacy and intentional infliction of mental distress. Petitioners complained that the mental health facility was negligent in knowingly allowing its administrative employee instead of a licensed psychologist to do the work; in not questioning the validity of the order(s); in not properly interpreting the orders by failing to follow the statute governing the report; and in not preventing the unauthorized disclosure of protected records.

The trial court granted summary judgment for defendants (Appdx. 1-11) holding that the administrative employee and the mental health facility were immune from all charges because the clinical evaluations and the report were court ordered.

Questions Presented

1. When an administrative employee of a mental health facility substitutes himself for the licensed clinician and performs a putatively court - ordered clinical evaluation, has

he committed a non-immunized, actionable invasion of privacy rights guaranteed by Article IV of the United States Constitution, by Article III of the West Virginia Constitution, by federal and state statutes, and by the Common Law, and is that employee likewise not immunized against a suit for damages due to infliction of emotional distress upon the patient's learning that the evaluator was not a licensed psychologist?

2. When a mental health facility provides putatively court-ordered services for clients but goes beyond the order by disclosing client records: (a) not explicitly required by the order, (b) which are protected by federal and state statutes and rules, (c) violating pre-disclosure client agreements, and notice and/or consent requirements of the statutes and rules by means of : (a) written reports, (b) unauthorized conversations with adverse attorneys, and (c) at trial as a witness for an adverse party - does the judicially created immunity for providers of services and for expert witnesses shield them from civil liability for violations of the statutory privacy rights of clients?

3. What is the liability of a mental health facility and it's employees for a prohibited release of records pursuant to a court order without notice to the client, when inquiry by the facility would have revealed: (a) the court lacked the statutory authority to mandate the release; (b) the individual signing the order lacked the statutory authority to sign the order; (c) the order required client consent prior to medical records release which was neither sought nor given by clients; and (d) state and/or federal law and rule prohibited the disclosure required by the order?

4. Is a person referred to a mental health provider by a putative court order a client/patient entitled to the confidentiality of records?

List of All Parties

Petitioners / Plaintiffs Below:

Ronald Jarmuth;
Angela Frinzi (now married and known as Angela Jarmuth)
Counsel for all above:

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540-343-6717; fax 540-343-8117

Respondents / Defendants Below:

Brian Krolczyk;
Valley Comprehensive Community Mental Health Center, Inc.;
Monongalia County, WV Board of Education (2)
Counsel for all above:

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PO Box 2190
Clarksburg WV 26302-2190
304-624-8000

Harrison County, WV Board of Education (1)(2)

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Harrison County Schools
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PO Box 1370
Clarksburg WV 26302-1370
304-326-7347

Notes:
(1) Harrison County has requested notices be sent as above.
(2) Boards of Education were Defendants to a separate lawsuit to enforce West Virginia law that Angela Frinzi's

daughter attend her local school in Harrison County, not a school 3 counties away in Monongalia County where neither parent nor child lived or worked, after the Family Law Master ordered her daughter de-enrolled from parochial school in Harrison County and enrolled in a public school 3 counties away ignoring the refusal by the local elected school board to consent. which approval is required by state law. The Circuit Court of Monongalia County joined the school suit with the Invasion of Privacy Suit at the request of common counsel for the mental health facility / the employee / Monongalia schools.

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PRIOR ORDERS IN CASE

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May 22, 2003 Consent Order of the West Virginia Board of Examiners of Psychologists sitting as an Administrative Law Court, In The Matter of Brian Krolczyk, PhD. Appdx 17.

May 4, 2001 Orders of Family Law Master that Ronald Jarmuth and Angela Frinzi undergo clinical evaluations, Appdx 14 (Frinzi order omitted from Appendix; identical except for name & ssn).

JURISDICTION

1. The order of the Supreme Court of Appeals of West Virginia refusing, without explanation, the Petition for Appeal, which was a final order of the highest court of a state.
2. It was entered on April 15th, 2004.
3. There was no petition seeking nor order granting a rehearing.
4. This petition was filed within the 90 days allowed, which expires on July 14th, 2004, and is thus within the time allowed under 28 USC 2101(c).
5. The jurisdiction of this court is invoked under 28 USC § 1257.

STATUTES

CONSTITUTIONS

U.S. Constitution - Amendment IV – 20
WV Constitution – Article III 20
3-1. Bill of rights 20
3-6. Unreasonable searches and seizures prohibited 20

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NOTICE TO DISINTERESTED PARTIES

The Clerk of Court has been notified in writing of Petitioner's belief that the Boards of Education, former nominal defendants, have no interest in the outcome of this petition as provided by Rule 12, paragraph 6. A copy of the notice was served upon them in accordance with Rule 29 paragraph 3.

CONCISE STATEMENT OF THE CASE

1. **Stage in Proceedings.** Summary judgment was granted defendants by the trial court. The state supreme court declined, without comment, the petition for review by appeal.
2. The **federal questions** sought to be reviewed were raised by petitioners' in their Response in Opposition to defendants' (in the trial court) Motion for Summary Judgment (applicable citations at Appdx 47-49), in petitioners' Additional Response (Appdx 49-56) and were repeated on in the Petition for Appeal. to the WV Supreme Court. (Appdx 56-57). The issue of invasion of petitioner's right to privacy of petitioner's mental health status and their medical records guaranteed by the federal and state constitution, statutes and rules, and professional negligence for unauthorized disclosure are counts in the original complaint. The issue of immunity was raised by defendants in their motion for summary judgment and was opposed in the cited responses and petition of petitioners (plaintiffs below) to the WV Supreme Court where petitioners stated that they would not have consented to be evaluated by Krolczyk and would have told him nothing if they were aware that he was merely an administrative employee, not a psychologist; where it was cited that Krolczyk's disclosures in his report violated federal and state law and rules; and where it was cited that there was a written client agreement, violated, regarding confidentiality and release of patient records which was signed by defendants and petitioners prior to submitting to treatment. The release of medical

information to the court (and others) without proper notice and release was raised in Petitioner's "Additional Response to Defendants ... Motion for Summary Judgment" as was the issue that Krolczyk talked and wrote to an adversarial attorney about details of petitioners' protected records without a release and that Valley did not protect patients from it's administrative employee impersonating a psychologist and learning details of intimate details of people's private lives that he was not entitled to hear, nor from the negligence of it's employees in failing to protect it's clients medical records from unauthorized release by the administrative employee.

3. In the responses petitioners questioned the immunity of defendants incident to court ordered services, noting that the spoken disclosure to the Guardian Ad Litem was not authorized in the putative court order; that the order did not direct release of the clinical records (but rather the report of investigation about the child); that it did not authorize any release without the consent of the clients; and that even when testifying as an expert, qualified or not, Krolczyk had no authority to breach records privacy without client consent.

REASONS TO ALLOW WRIT

I. Violation of Statutes

1. The stated public policy of the states and the federal government is to prohibit the unlicensed practice of psychology (WVC 30-21-3, Appdx 30). The states see this as so harmful (WVC 30-21-1, Appdx 28) that such conduct is deemed criminal. This is even more heinous when the unlicensed practice is performed within and sanctioned by a legitimate mental health facility and the licensure, training and experience of the unlicensed individual is misrepresented to unknowing and trusting clients / patients.

2. The practice of professions is governed in all states by state law and regulated by professional boards or bodies

within the state executive branch.. Such regulation is not for the benefit of the members of the profession but to protect the public from the damage which unqualified individual can wreak on the public. The federal government has recognized this by including within statutes and rules relating to the performance and billing of medical and mental health procedures a restriction that such procedures may only be performed by individuals licensed by their appropriate state boards.

3. In West Virginia the legislature has stated the concern about such damage in WVC **30-21-1. Legislative findings and declaration of public policy** (Appdx. 28), where it stated " that in the public interest persons should not engage in the practice of psychology in this state without the requisite experience and training ... to protect the interests of the citizens of this state from the unauthorized, unqualified and unregulated practice of psychology. ... the practice of psychology affects the general welfare and public interest of the state and its citizens; ... that the evils of such unauthorized and unqualified practice may be best prevented and the interest of the public best served by regulating and controlling such practice as provided in this article."

4. Likewise states and the federal government have recognized the need to assure the privacy of disclosures (WVC 27-3-2, Appdx. 27) made in the context of obtaining services from such facilities, due among other things to the mental harm which is consequentially inflicted upon clients when learning that their intimate secrets have been disclosed to persons to whom they would never have made such a disclosure. This recognition is likewise reflected in federal (42 CFR 2.6, 45 CFR 164, Appdx. 20-25))and state statutes and rules (WVLR 17-3, Appdx. 26). Outside of commitment proceedings tightly regulated to assure due process and to protect individual liberties, there are no situations where a person can be compelled to make any disclosure to a mental

health professional, whether immunity of the occasion is assured or not.

5. The recourse of an individual against a person or facility which utilizes an unlicensed individual or which violates privacy rights protected by statute includes ethics complaints to the state licensing board. Such boards, however, have no authority when the individual has not even applied for supervised status, which denies such a board jurisdiction. If the individual or facility has applied for supervision or licensure the board then has jurisdiction. But the action of the board is not to remediate the damage which has been visited upon the individual but rather to punish for disregarding and to compel obedience to the law of the state. As the statutory complaint forms recite, individuals harmed by unlicensed practice or by unauthorized disclosure must obtain relief through civil action.

6. The prohibition on unauthorized practice and unauthorized disclosure, at least in West Virginia, are stated in statutes, not in the legislative rules of the licensing board. They reflect the seriousness with which such infractions are regarded. The federal government likewise bars such unauthorized practice and disclosure through 42 CFR 290 (Appdx 20) and 45 CFR 164 (Appdx 23-24). Where the WV legislature felt that exemption from violation of the restrictive statutes was merited it stated such exemptions in explicit law. The WV statutory exemptions are WVC 29-12A - employees of political subdivisions acting with the scope of their employment; WVC 27-16-3 - surgeons performing procedures in mental institution in emergency situations; WVC 30-3-10a - special volunteer medical personnel; WVC 30-3C-2 - persons filing ethics complaints; WVC 48-16-504 - employer immunity to withholds support payments; and WVC 18-2-53 - school employees reporting students without a birth certificate. The failure of the WV legislature to enact some escape from the prohibition on unlicensed practice of psychology and unauthorized disclosure of records should

be taken that all such infractions are prohibited. In the previously quoted statute of legislative intent, WVC 30-21-1, it is clear that, the restrictive legislation is meant to protect the public, not the state. In WV all statutes which convey personal rights or protections are actionable by civil suit - WVC §55-7-9. (Actions for Injuries) Violation of statutes which provides that "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages."

7. The immunity against civil suit is judicially created and has heretofore been asserted against civil liability for errors and omissions in the performance of the specific service ordered by the court by individuals who could lawfully perform those services. In the case at bar the order in question was unlawfully (WVC 48A-4-9 -13 -15 -20 Appdx 31-32) issued by a master not delegated the minimal authority of even a judge pro tem. The WV Supreme Court, by refusing the petition for appeal and hence adopting the finding of the trial court , has superseded the legislative intent of the state legislature and of the Congress by expanding that immunity to encompass all employees of the mental health facility and to include acts which constitute crimes. The granting of immunity presents the unusual circumstance that before the trial court (in the case appealed from) granted the immunity - and hence summary judgment in favor of defendants - the administrative employee (who had subsequently applied to the licensing board for the beginning of a period of supervised practice, and thus became after-the-fact subject to the board's jurisdiction) had been convicted (Consent Order Appdx 17) by the Board of Examiners of Psychologists - sitting as an administrative law tribunal - of the illegal practice of psychology (WVC 30-21-2, Appdx 28) and of breaching the records privacy of these petitioners, the very charges which the trial court held

that employee immunized from. There is little if any case law to be found regarding immunity from civil liability for torts defined as crimes committed by such providers incidental to serving as providers of putatively court ordered services. The WV Supreme Court, by refusing the petition for appeal, has left the situation perilously ambiguous.

8. All states have relatively uniform statutes prohibiting such conduct which statutes have the same effect as the Code of Federal Regulations likewise prohibiting such conduct. Heretofore the immunity asserted by the employee has never been claimed and no case has been found where it has ever been granted in like circumstances. It is appropriate for this Court to state whether this expansion of the immunity of providers of court ordered services is an acceptable limitation on liability for the statutory restriction on (un)professional conduct or is a necessary concession to secure the availability of providers of putatively court-ordered services.

II. Mental Health Record Privacy: Individual Constitutional and Statutory Rights

1. In West Virginia, as in most if not all states, whether communications between a provider of mental health services and a client are deemed legally privileged is not left to a judicially created privilege but is stated by statute. WVC 27-3-1 (Appdx 27, confidential information ; disclosure, Communications and information) includes all the information which could conceivably be protected by the judicially created privilege stated in Jaffee v Redmond, 518 U.S. 1; 116 S. Ct. *1923; 135 L. Ed. 2d 337,* No. 95-266.

2. In WV there are three instances in statute (WVC 27-3-1) which limit that broad protection against unauthorized disclosure, the first two of which are cited in that statute. The **first** is the disclosure of the results of involuntary commitment proceeding, where the examination has been ordered by a court after a hearing with extreme due process

protections for the "client", or where a licensed professional believes that his client is imminently likely to harm himself or others . In this instance the record is involuntarily created - but the "client" still has the opportunity to limit the creation of that record by remaining silent, and not participating. In the case at bar the master was naked of any lawful authority to issue the order of referral, lacking the legitimate power of even a judge pro tem. The **second** exception occurs where the record exists and a court of competent jurisdiction enters an order "based on a finding" that the " information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality" which is in direct juxtaposition to the privilege of Jaffee. 45 CFR 164 has a similar exception which appears to be juxtaposed to the privilege of Jaffee: 164.512(e)(i) (Apppdx 24-25) states "In response to an order of a court ..., provided that the covered entity discloses only the protected health information expressly authorized by such order". It would appear that a federal court could not order such a disclosure but a state court could, which leaves the confidentiality of records uncertain. In Jaffee this Supreme Court held "that uncertain privileges are disfavored".

3. Not every state court order is enforceable against the confidentiality of records mandated by federal CFR. 42 CFR 2.64 (Appdx21-22) "Procedures and criteria for orders authorizing disclosures for noncriminal purposes", prescribes a mandatory procedure which must be followed to obtain such an order including how the application must be made, how the hearing must be conducted, the determinations which must be made, and even the wording of the order and the protections for the client which the order must contain.

4. 42 CFR 2.64 (a) reflects an apparent finding by the federal government that the protection against involuntary disclosure afforded in federal courts by Jaffee should be limited to the case law exceptions to Jaffee. The CFR

provides only three instances where a state or federal court may order the disclosure of a record: (a) to protect against an existing threat to life or of serious bodily injury; (b) to investigate a crime; and (c) to impeach a client who voluntarily decides to testify about or offer as evidence some of that confidential record in a civil proceeding.

5. In the case appealed from the court orders (Appdx 14) did not even begin to meet the protective procedures mandated by the CFR. There was no application for such an order, no notice, no hearing, no finding of facts, and none of the mandatory protections which the CFR requires to be included in an enforceable order. Further, exceptions (a) and (b) did not apply and neither of the petitioners to this court stated an intent to discuss the Valley Comprehensive Community Mental Health Center, Inc. record or to offer evidence from it. Thus when adversary attorney Debra Bowers did in fact offer the confidential records of both petitioners at trial against petitioner Frinzi without the consent of either petitioner, and when employee Krolczyk likewise testified as to the details of the record and sessions without consent – it was a disclosure which the family law court was not allowed to order.

6. The statement of mandatory procedures which the CFR specifies implies that the records holder must validate and memorialize in writing its compliance with the rule. If the disclosure had been sought from the records custodian or from a licensed professional of the facility, it is possible that a refusal or at least an objection would have been raised. The employee, Krolczyk, was neither the facility records custodian nor a licensed professional. Recognizing Krolczyk's shortcomings in this area, as part of the professional board's punishment it required him to undergo additional training in ethics and related law.

7. There is a **third instance** in West Virginia and in most, if not all states, where the contents of a mental health record is not privileged. That is pursuant to abuse and neglect proceedings regarding a child, which in WV is a "Chapter

49" proceeding. WVC 49-6-4 provides for a court to order a suspected abuser to undergo an examination by a mental health professional and for the record of that examination to be disclosed to the (closed) circuit court. The WV Supreme Court, in a recent decision, made certain pertinent findings. In case In Re: Daniel D and Samantha D, No. 29965, 211 W. Va. 79; 562 S.E.2d 147 (2002), decided February 22, 2002, that [1] court noted that "in considering instances where a court could order a parent to a medical or mental examination, (it) was able only to cite the provisions of Chapter 49 of the code relating to child abuse and neglect proceedings in the Circuit Court. WVC 49-6-4(a)." It noted that the statute provides that the adult can refuse to undergo the examination and that "the court shall not terminate parental or custodial rights of a party solely because the party refuses to submit to the examination." which is identical to the general rule that no conclusion may be drawn when a person invokes any privilege or the 5th Amendment to the United States Constitution. It held that the only "involuntary" examination relating to a proceeding involving a child which a WV court might order was relating to a Chapter 49 abuse and neglect proceeding and that the privilege of refusing such an examination and being protected from the drawing of any inferences likewise applies. In Re Daniel D provides authority that the order of the family court requiring clinical evaluations in the context of modification of a parenting plan was invalid in terms of state law, without needing to cite the deficiencies of failure to comply with the CFR.

8. It makes a mockery of any right of confidentiality if the holder of attorney, clerical, medical, or mental health records disclosed every detail of a privileged session to an

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[1] The father in In Re: Daniel D. refused to submit to the examination claiming it violated his 5th Amendment rights and that he could not trust Child Protective Services to obey the law regarding restricted disclosures, arguing that once such material got out it might be used to impeach him in related criminal charges – he denied the allegations of abuse and neglect.

adversarial party without the consent of the client. It is a further subversion of privacy rights if the supposed clinician agrees to and testifies as an "expert" witness for the adversarial party, discussing the details of the client's privileged mental health records material - and no non-privileged information.

9. The right of records confidentiality is meaningless if it can not be enforced through civil suit for damages for it's breach when the privilege has been breached without prior notice and opportunity to prevent the breach.

10. The trial court's finding that the written and verbal disclosures by the employee were immunized because the family law court (via its unauthorized master) had ordered a report is a direct attack on the applicable federal statutes cited and on the WV case In Re: Daniel D. It ignores the point that the putative order required all necessary client consents to first be obtained, that the putative order required a report concerning the child's needs (not the clinical histories of the petitioner clients), ignored that a family law master had no authority (WVC 48-A-4-9, Hearing Procedures, Appdx 31 to sign such an order (he was allowed only to recommend such an order to a circuit court judge), and that no statutory authority existed to compel the creation of the record through an involuntary clinical evaluation.

11. In Northwestern Memorial Hospital v John Ashcroft, Attorney General of the United States, No. 04-1379 in the US Court of Appeals for the 7th Circuit, 362 F.3d 923;58 Fed. R. Serv. 3d (Callaghan) 173 March 26, 2004, the appellate court upheld a district court which quashed a subpoena to compel records so as to gain evidence in criminal investigation. The appellate court wrote that the government's belief that there was a "possibility that it may find something" was insufficient to breach "the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, 110 Stat. 1936" which enacted the citations of 42 CFR raised in this petition. On point as to petitioner Ronald Jarmuth, who

was not a party to the family court proceeding, the Court held that "the potential loss of privacy that would ensue were these medical records used in a case in which the patient was not a party" was unacceptable and that courts must aggressively protect the confidentiality of records guaranteed by HIPAA, citing "the natural sensitivity that people feel about the disclosure of their medical records" which is "the sensitivity that lies behind HIPAA".

12. A finding by the United States Supreme Court is appropriate to vindicate the authority of the federal government to regulate professional conduct where such regulation has been held lawful and to return the rights to seek civil redress when such protective statutes are violated.

III. Confidentiality of Records Exists In All Situations Where a Client Obtains Services from a Provider of Mental Health Services.

1. The trial court held that because the family law master ordered petitioners to arrange for a clinical evaluation to be arranged by the mental health facility they had no client rights and were not clients. This issue was specifically rejected by counsel for petitioners' in their Responses in Opposition to Defendants' Motion for Summary Judgment.

2. Petitioners cited that they (and the representative of the facility) signed voluntary Client Rights Agreements - "Valley Haelthcare System Client Rights - Authorization for Treatment" (Appdx 58) the first words of which read "As a client of Valley HealthCare System you have the right" (Appdx. p 58). These agreements provided for confidentiality of records, control by the client over services (and right to refuse services), and exercise of civil rights; that they had the right to refuse to give consent for treatment and release of records; and that they signed a contract with the provider obligating them to pay for the services rendered. The payment agreement gave the facility the right to sue these petitioners if they failed to pay for the services. The agreement in effect stated that in exchange the facility would

provide the agreed upon services. The trial court held that none of this constituted a contract and that petitioners were not clients.

3. The definitions of 42 CFR 164 (Appdx 23) do not depend upon the circumstances in which a record is created, upon the existence of a contract, upon payment agreements, or upon the reason(s) an individual receives services.

a. All records of a covered provider are subject to confidentiality restrictions, which includes, per 45 CFR 164.501(1) "the medical records and billing records about individuals" and "**any item,** collection, or grouping of information **that includes protected health information** and is maintained, collected, used, or disseminated by or for a covered entity." A covered entity does not have a protected and an unprotected set of records - especially where, in the case of Valley Comprehensive Community Mental Health Center, Inc. - there is only one common records system. Petitioners' files were placed within the common Valley system of records and were retrievable by their unique names and social security numbers.

b. Rather than use the phrase "client" or "patient", the CFR refers to a "direct" or "indirect" treatment relationship, both of which create a protected set of records. A "Direct treatment relationship" is defined where a healthcare provider provides treatment. A direct or indirect treatment relationship exists where a "health care provider typically provides services or products, or reports the diagnosis or results associated with the health care". In preparing the billing report for the services he provided, the employee Krolczyk utilized standard procedure codes used to provide clinical services, such codes having been defined by the State of West Virginia for federal Medicaid and Medicare billing. During 2001, when the services were provided, approximately 95% of Valley's billing was through Medicare and Medicaid.

c. Psychotherapy notes, while filed apart from most other records (for reference by a clinician) are considered

protected records by the CFR (they are uniquely retrievable by patient name and/or social security number). 45 CFR 164.501(1) defines psychotherapy notes as "notes recorded (in any medium) by a health care provider ... documenting or analyzing the contents of conversation during a private counseling session". Krolczyk's exclusive contact with petitioners was in a single (each petitioner) session; he used those notes in his unauthorized discussions with Debra Bowers (the adversary attorney for the child), and in his unauthorized testimony at trial on behalf of Bowers. [2]

d. The services rendered by Krolczyk as an employee of Valley constituted "treatment" within the definition of the state statute (WVC 30-21-2, Appdx 28) and the federal rule which defines treatment as "the provision, coordination, or management of health care and related services by one or more health care providers". Clinical evaluations clearly are "related services" (WVC 30-21-2(d) and (e)(vi) Appdx 29).

4. The restrictions on disclosure stated by 42 CFR 164 relates to information in the provider's system of records, without reference to how they got there. Clearly the protections afforded by the federal rule are applicable to anyone receiving services, under any circumstances, by a covered provider.

5. During the testing and face-to-face clinical sessions Krolczyk attempted to learn whether petitioners had habits, including drug and alcohol abuse, which might reflect adversely on them. Whether he found such abuse existed or not, the situation constituted the context for the diagnosis of drug and alcohol abuse.[3] 42 USC Sec. 290 provides additional confidentiality restrictions under such circumstances, irrespective of the circumstances under which the diagnostic situation took place. Subsection

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[2] Despite Bowers' request, the Court refused to seat Krolczyk as the Court's witness, stating that Bowers might call Krolczyk as her witness.

[3] Krolczyk reported that he found that Petitioner Frinzi's ex-husband and girl friend had at a potential for alcohol abuse.

dd(3)(a) provides that " Records of the identity, diagnosis, prognosis, or treatment of any patient ... shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section". The disclosure restrictions (2.63 and 2.64) are identical to those stated in 42 CFR 164 previously stated.

6. The procedures were titled "clinical evaluations" (Jarmuth Report, Appdx 33; reports as to all adults identical in form). West Virginia statutes 27-3-1(a) define any information collected in conjunction with an "evaluation" as "confidential information". The statute further indicates that a person subjected to "treatment or evaluation" is a "client or patient". The restricted information includes "opinions formed regarding a client's or patient's physical, mental or emotional condition" - which is exactly what employee Krolczyk disclosed in his report, in his discussion with Bowers, and in his putatively expert testimony at trial. Ignoring the fact that the order was for a report concerning the child, which was never rendered, the WV statute (WVC 27-3-1(b)(3) Appdx 27) provides that an order for disclosure is only valid if it results from a hearing at which the court makes an evidentiary "finding that said information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section". No hearing was ever held, no finding (in the report or elsewhere) was ever made. It is noteworthy that the information provided by Krolczyk said nothing factual regarding the parenting skills of Petitioner Angela Frinzi and said nothing regarding Ronald Jarmuth's relationship (if any) with the child.

7. It is thus clear that the trial court clearly erred in finding that a contract and client relationship had to (and did not) exist to entitle petitioners to the right of confidentiality of their records, and that petitioners were not clients of the mental health provider - and that such a finding is clearly opposite the statutory provisions of federal and West

Virginia law. The effect of the refusal of the WV Supreme Court to review the judgment of the trial court is to adopt this erroneous conclusion within West Virginia. It is appropriate for the U.S. Supreme Court to specifically address this issue so as to assure the same protection of records of citizens in that state as are afforded - by operation of federal law - to citizens in all the states and to enforce the federal mandate in that state.

Relevant Facts and Considerations of Law

I. Trial Court's Finding That a layman may impersonate a psychologist,

priest, doctor or attorney so as to hear the intimate details of a client's life which would not be related by the client if the client knew that the professional was actually a layman, and no recourse exists if the client had been ordered by the court to obtain psychological services from the mental health facility. The trial court held that because Petitioners were at the mental health facility, Valley, pursuant to a court order, Valley and it's employees were immunized against liability for any and all misdeeds committed by Krolczyk.

1. Krolczyk was an administrative employee (deposition Appdx 43) who impersonated a psychologist (Consent Order of Licensing Board Appdx 17). The clients were given a written document by the mental health facility stating that the individual was a psychologist (Appdx 34). The management of the mental health facility knew that the employee was impersonating a licensed psychologist and practicing psychology illegally. Impersonating a licensed psychologist, Krolczyk asked questions about and received answers regarding intimate details of both Petitioners' lives.

2. The court's orders for investigation (Appdx 14) cited WVC §48-11-301, Court-ordered investigation (Appdx 30), and stated that the investigation regarded the "Allocation of Custodial and Decision-Making Responsibility for Children". It appointed Valley as the "investigator". Paragraph 5 of the Orders required Valley to obtain releases

from Ronald Jarmuth and Angela Frinzi prior to the performance of the investigation (and the report) and allowed Jarmuth and Frinzi to refuse any consent for cause. In their response to Defendants' Motion for Summary Judgment, Petitioners pointed out that they would never have consented to being evaluated by Krolczyk if they suspected that he was an imposter.

3. The Order for investigation stated that the "Fact Finding Investigation" was ordered "pursuant to West Virginia Code §48-11-301." The statute (Appdx 30) provides that the investigation and report are limited to collecting "information about the child and the potential parenting or custodian arrangements." The statute provides that the court "*may refer the child to professional personnel for diagnosis.*" There is no authority for court ordered services for an adult . The court expressly ordered that the child NOT be evaluated. Thus while Jarmuth and Frinzi were ordered to cooperate with the investigator - and permitted to refuse anything for good cause - the information which they were expected to provide which might be disclosed in the investigator's report was, per the statute, "information about the child and the potential parenting or custodian arrangements" and not details of the mental health of the adult petitioners. This is expressly significant as to Jarmuth as he was not a parent nor a step parent, and did not exercise any custodial duties towards the child. Per paragraph 6 of the order (Appdx 15) a child who has reached the age of 12 had the right to refuse to talk to the investigator. Certainly Jarmuth, an adult non-parent, and Frinzi, an adult, had the right to refuse to talk to Krolczyk and would have if they had known he was an imposter.

4. As pointed out in their Response to Defendants' Motion for Summary Judgment, prior to allowing any interview or tests Jarmuth and Frinzi signed the same documents as are signed by all other Valley patients undergoing any psychological services, including a statement of patient rights (co-signed by Krolczyk) and a statement of obligation

to pay. The authority of the Court was limited to requesting that Jarmuth and Frinzi cooperate with Valley as investigator determining facts about the child; their agreement to undergo a clinical evaluation which they had the right to refuse to (per the order) was not a waiver of their rights which they gained when Valley accepted them as clients. Jarmuth and Frinzi explicitly told Krolczyk that they rejected the notion that the order required them to undergo a clinical evaluation, and that they were accepting such services in the capacity as a client with all the rights of a patient.

5. The Agreement of Client Rights (Appdx 58) which was signed by Krolczyk and Jarmuth and (separate agreement) Frinzi recited that they had the rights to "refuse services" "confidentiality of records" the "exercise (of) civil rights" and to "be informed". The civil rights agreed to by Valley include the right to restrict the circumstances under which the intimate details of one's private life would be divulged, and to whom.

6. The trial court's assertion that Krolczyk and Valley are immune to recourse for his impersonation calls out for the United States Supreme Court to clarify the issue of the recourse of victims of professional impersonation. The application of immunity is wrong for several reasons:

(a) If the family law master (possessed lawful authority under state law which he did not) had meant to order a clinical evaluation to gain information of evidentiary value in formulating a parenting plan for the child, such an order is prohibited by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), codified as 42 CFR 2.6 and 45 CFR 164. It would be an appropriate vindication of the protection offered by HIPAA if the United States Supreme Court clarified that where a court has the authority for and orders clinical services, the performance of those services by an unlicensed individual who thus penetrates the private thoughts of an individual is a violation of their

constitutional and statutory right to privacy and is actionable in all circumstances.

(b) Jarmuth was not a party to the parenting plan proceeding and the family law master had no personal jurisdiction over him;

(c) Such an order as it was established has no authority in West Virginia law and is prohibited by 45 CFR 164. If the court lacks the authority to order such an evaluation it lacks the authority to grant immunity for rendering the ordered services.

II. Trial Court's Finding That unauthorized disclosure of a patient's mental health records is immunized if the facility provided court ordered services.

1. The trial court resolved (Order granting summary judgment to defendants, Appdx 1) the conflict between (a) statutory confidentiality of records as recited in federal and state statutes and (b) the improper behavior of the provider and it's employee in favor of allowing improper behavior which violates explicit statutes. The trial court asserted that the judicially created concept of immunity arising from court- ordered services excused all the unlawful acts that ensued. This ruling undermines the protections embodied in statutorily mandated procedures which must be followed to obtain disclosures. The trial court explained that the evidentiary needs of a court overcomes any infirmity in observing rights protected by statute. The trial court's decision is particularly offensive because Jarmuth was not a party to the proceeding and had no notice nor opportunity in court to object to the unauthorized disclosures. His mental health records that were disclosed had no relevance to the judicial objective stated by the (family) court which was to determine the special needs of the child, if any, so as to reflect them in a modified parenting plan.

2. Krolczyk was not the custodian of records at Valley. Jarmuth and Frinzi had a signed statement of client rights guaranteeing them the "confidentiality of records" and the

"exercise of civil rights". They had been verbally assured that no release would be made without prior notice to them and under no circumstances without a prior written release by them. Both federal and state law prohibited a release without the clients' consent, even in the face of a court order which failed to meet the standard of HIPAA (as noted in Northwestern Memorial Hospital v Ashcroft, op.cit.). The (family) court proceeding did not concern the mental health status of the clients and neither petitioner stated their intention to raise that issue or their records.

3. Krolczyk released the entire contents of petitioners' files to the Court and to adversarial parties with no prior or subsequent notice or client release. Krolczyk ignored the requirement of federal law to make a record of the release in Valley's files and to mark the records with a statement prohibiting re-release or use.

4. Subsequently, still with no notice or release, he discussed the details of his clinical sessions and his clinical conclusions with Debra Bowers, an attorney for an opposing party. She in turn (without release or notice) used the details of the clinical sessions and the clinician's clinical conclusions against the clients in court papers she filed and at a trial in the family court (she knew Krolczyk was not a psychologist but nevertheless referred to him in her report (Appdx 40) and at trial as a "licensed psychologist" and as a "psychologist"). Krolczyk did not record his conversation with Bowers or his testimony at trial in Valley's files, another violation of federal law. At trial he lied under oath (Appdx 42) about his licensure status, training and experience. As Krolczyk later testified in a deposition (Appdx 42-45), he had no expectation that he would ever testify at trial, and he had never testified in any capacity at a trial before. Thus these disclosures had nothing to do with any privilege as a fact or expert witness at trial.

5. The trial court explained it's conclusion by stating that the family court ordered that Valley provide it a report, citing WVC 38-11-301 and that Bowers was a named

recipient of the report. Regarding the order, the trial court was silent on how the master had lawful authority only to recommend that a Circuit Judge issue such an order, and that a master could compose and recommend but not sign such an order himself (WVC 48A-4-9, -13 -15 -20, Appdx 31-33). This explanation also fails because, as previously explained, the putative order (Appdx 14) stated that Valley was to take no action which required a release by the clients until it received such a release, because the statute defines the report as one relating to the child's needs, because the order allowed the clients to make any and all refusals for good cause, because federal and state law prohibits such a disclosure and require a clinician to notify his client and to refuse an unlawful order made without hearing, because federal and state law provide no authority for the family law court to order the disclosure of the records of anyone but the child (and she can refuse if over 12) and because the order made no provision for protection of the records from re-release or for their destruction after use in the proceeding.[4]

6. It is notable that the reports (Jarmuth, Appdx 35; all other reports identical in structure) did not say one word about the child but dealt exclusively with the clients. The reports had no probative [5] value in modifying a parenting plan to reflect the relocation of the primary custodian.

7. It is our position that the clear and explicit statutory protections of 42 CFR 164 and other statutes and rules as to confidentiality are not surrendered in the face of a court order for services. The decision of the trial court below indicates that there is a need for this Supreme Court to enter an order clarifying the limits of the immunity of a mental health facility and it's employees when putatively court

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[4] In a later order the law master refused petitioners' demand for records destruction, after the trial, which is required by 42 CFR 164.

[5] In the Order granting summary judgment the trial court in this matter noted that the reports (Appdx 9) were "hearsay" and inadmissible by themselves.

ordered services are performed and federally protected confidentiality rights are violated.

III. Trial Court's Finding That unauthorized disclosure of a patient's mental health records at trial is immunized if discloser is called as an expert witness (by opposing counsel).

1. With no authorization from Valley management Krolczyk agreed to use his confidential knowledge to assist Bowers to litigate against Frinzi. With notice to Frinzi's attorney the evening prior to the hearing on the parenting plan and no notice to Jarmuth, Krolczyk appeared at the hearing / trial as an "expert witness" for Bowers, lying under oath about his licensure status, training and experience (Appdx 42, 46) in order to qualify as an expert. The suit under appeal to this Court does not challenge the master's seating Krolczyk as an expert, no matter how erroneous it was (the Family Master knew that Krolczyk was lying under oath about his licensure status, training and experience, but failed to disclose this to the parents). It is conceded that as an expert Krolczyk is immunized from offering an opinion based on evidence he is allowed to refer to. The family court refused a request by Bowers at trial to seat Krolczyk as the court's witness or to order him to testify so as to insure his immunity from subsequent litigation.
2. Krolczyk brought with him the confidential client records with no authorization from the clients and no record of disclosure at Valley. His testimony was exclusively regarding confidential records of clients, and he eventually offered an opinion on custody which he stated was based exclusively on the confidential client records. Counsel for Frinzi objected to his testifying about his sessions and conclusions drawn from those sessions. Jarmuth had no such opportunity being excluded from the courtroom as a non-party.
3. In the suit appealed to this Court Petitioners asserted that appearing as an expert witness did not allow Krolczyk

to testify about the confidential records – that he was only allowed to testify about and draw conclusions from non-privileged material, and he had no such material. Petitioners claim that Krolczyk and Valley are liable for invasion of privacy and intentional infliction of emotional distress from the consequences of his use of privileged communications. The trial court in this case held that as an expert witness Krolczyk was immune from litigation regarding anything which occurred while he was on the stand.

4. This interpretation has the practical effect of voiding the confidentiality restrictions of state and federal law, because this interpretation means that an opposing litigant or the court need merely recruit the clinician (or the party's former attorney, doctor or pastor) or an employee of the mental health facility, name him as an expert witness, and gain access to the privileged (attorney – client, pastoral, medical, or mental health) records through distribution of same as "underlying data" supporting the expert witness' testimony at trial. Using the direct testimony of the "expert" regarding privileged communications between a party and his clinician / attorney / pastor / doctor voids any protection of rights supposed to be shielded by the privilege, and irretrievably taints the reliability of what the trial court bases the ultimate decision upon. This extension of immunity eviscerates all confidentiality rights and privileges, not just the mental health records confidentiality of 42 CFR 164 (and other similar statutes and rules). The trial court held that the client has no recourse against a "professional" or the professional's employees who has violated the confidentiality rights of the client.

5. The trial court's application of total immunity to all acts when a person has served as an expert witness and has violated the confidentiality rights of a client is such a broad rejection of established law and judicial doctrine that it merits an unambiguous rejection of this unlimited extension of the doctrine of judicially created expert witness immunity.

6. It is notable that:

(1) Krolczyk was not the custodian of records at Valley.

(2) Debra Bowers was appointed by the Family Law Court as the Attorney for the Child, and took on the role of a hostile adversary (party).

(3) Krolczyk and each client had signed a Valley "Client Rights - Authorization for Treatment" which assured the "confidentiality of records"; he verbally assured petitioners that no release would be made, not even per a court order, unless the clients signed a release which conforms to that specified in federal law. He specifically told Jarmuth that no report would even be contemplated until after Jarmuth had first seen any draft report and had approved it. Krolczyk reneged on these commitments.

(4) The order stated that "a written report shall be prepared in this matter pursuant to West Virginia Code §48-11-301." Subsection (b) of that statute limits the investigation to "information about the child" and the diagnosis of "the child" performed by professional personnel. Krolczyk was not a "professional" and Jarmuth's and Frinzi's mental health records held by Valley were not "information about the child". Paragraph 8 of the order mandated that the report would comply with subsection (c) of WVC 48-11-301, which limits the contents of the report to data collected "pursuant to the provisions of subsection (b) of this section " - meaning information about the child released per consents of the child if he/she is over 12.

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